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SUPREME COURT, U.S.

NO. 80-5320

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

THOMAS A. BAREFOOT,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner's contention of denial of due process is properly before this Court since it was not raised to either the trial court or the Texas Court of Criminal Appeals.

II. If Petitioner's due process contentions are properly before this Court, was the use of hypothetical questions to expert psychiatric witnesses a denial of due process.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, and in response to the Petition for Writ of Certiorari of Thomas A. Barefoot would show the Court the following:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Barefoot v. State, 596 S.W.2d 875 (Tex.Crim.App. 1980), and is reproduced as Appendix B to the petition for writ of certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). However, as noted in the reasons for denying the writ, Petitioner has not presented to the Texas courts the issues which he presents herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Const., Amend. VIII.

2. United States Const., Amend. XIV.

STATEMENT OF FACTS

Petitioner was indicted for the August 7, 1978, capital murder of Carl Levin, a peace officer in the lawful discharge of an official duty. The evidence introduced at trial showed that at the time of the murder, Petitioner was a fugitive from justice from the state of New Mexico where he was charged with rape, sexual abuse, and kidnapping of a child. He was also charged with escape in that state. Petitioner had planned a robbery in Harker Heights, Texas, and planned to create a diversion for the police by setting fire or blowing up a building in that community. Petitioner had an associate take him to Harker Heights where the associate left Petitioner armed with a .25 caliber pistol and a gallon of gasoline in a plastic milk jug. (S/F 1524-28).

Officer Carl Levin was called to investigate the fire. Petitioner was seen by witnesses at the fire. Those witnesses informed Officer Levin who drove his car in the direction that Petitioner had been seen heading. Another witness, Mr. Michael Thrash, saw a patrol car stop and an officer get out. He then saw a man wearing bluejeans and a white T-shirt walk out of the bushes and approach the officer. The man who had appeared out of the bushes shot the police officer in the head at point blank range. (S/F 1237-43). Carl Levin died beside his patrol car with his gun still strapped in the holster. (S/F 1253, 1331). The autopsy revealed that the officer died from a bullet fired at close range that entered the left side of his forehead two inches above his left eyebrow and passed through the brain. Petitioner was arrested in Houston, Texas, on August 8, 1978. A fully loaded .25 caliber automatic pistol was found in his right rear pocket. (S/F 1675-80). Ballistic tests revealed

that the bullet that killed Officer Levin and the shell casing found beside his body were fired from the pistol seized from Petitioner at the time of his arrest. (S/F 1781-82).

The jury found Petitioner guilty of the offense of capital murder as charged in the indictment. The jury additionally returned a verdict of yes to all three special issues. The trial court then assessed punishment at death in accordance with the statute.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. In that appeal, he raised questions as to the qualifications of the experts who testified on hypothetical questions and the nature of the hypothetical questions. Petitioner did not raise an issue of denial of due process or cruel and unusual punishment as to the hypothetical questions or the testimony given in response to those questions.

SUMMARY OF ARGUMENT

Petitioner has argued that certiorari should be granted to consider whether the use of hypothetical questions at his trial violated the Eighth and Fourteenth Amendments to the Constitution of the United States. These issues were presented neither to the trial court nor to the Texas Court of Criminal Appeals. Therefore, certiorari is inappropriate as to these issues. Further, even if these issues were properly before the Court, Petitioner has raised a question only as to the weight of the testimony and not as to its admissibility. Therefore, Petitioner has not raised a federal question.

REASONS FOR DENYING THE WRIT

I.

PETITIONER DID NOT PRESENT TO THE COURT BELOW THE CONTENTIONS WHICH HE RAISES ON CERTIORARI.

Petitioner contends that the use of the hypothetical questions during the punishment stage of his trial violates

the Eighth and Fourteenth Amendments to the Constitution of the United States. He has raised his arguments in this Court in the context of denial of due process and cruel and unusual punishment. This was not the basis raised in the Texas Court of Criminal Appeals. (Appellant's Brief 55-65). Further, the court below did not consider these contentions on the basis of the Fourteenth or Eighth Amendments to the United States Constitution. There was no discussion of a due process violation in the use of this testimony or any discussion that the testimony might constitute cruel and unusual punishment. Therefore, since Petitioner did not present this question for consideration to the court below and it was not considered, it should not be considered on certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 351 (1973).

II.

PETITIONER'S CONTENTIONS AS TO THE RELIABILITY OF EXPERT TESTIMONY BASED ON HYPOTHETICAL QUESTIONS RAISE NO FEDERAL QUESTION.

Petitioner argues that psychiatric prediction of future behavior is so unreliable as to constitute a denial of due process and create a cruel and unusual punishment. In Petitioner's case, both expert witnesses were asked hypothetical questions based upon the facts presented in evidence by the State. Their conclusions were opinions based upon those facts. Neither psychiatrist examined Petitioner or based his finding on any statements made by Petitioner. The expert opinions were subject to cross-examination and impeachment as are any other expert opinions.

This evidence was not the only evidence used during the punishment stage of Petitioner's trial. The jury had before it the evidence that had been presented at the guilt stage of of the trial as to Petitioner's involvement in the crime. The jury also had evidence of Petitioner's bad reputation in several states and his prior offenses. Additionally, the State of Texas proved up Petitioner's extraneous offense for sexual abuse and

kidnapping and rape of a child in New Mexico. Petitioner's argument goes only as to the weight to be given this evidence. He complains that the hypothetical question erroneously assumes as true disputed facts, that it adds no mitigating circumstances, and the like. He sets forth no reasons why the testimony should be inadmissible on federal constitutional grounds. Therefore, Petitioner has not presented a federal question to be considered on certiorari.

CONCLUSION

For all the foregoing reasons, Petitioner prays that certiorari be denied.

Respectfully submitted,

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